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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 613

THE ST. REGIS TRIBE OF MOHAWK INDIANS, *Petitioner*,

v.

THE STATE OF NEW YORK, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

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December, 1958.

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THE STATE OF NEW YORK, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

The above-named petitioner, by its counsel of record, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York State in this cause.

Opinions Below

The opinion of the Court of Appeals, dated June 25, 1958, is officially reported at 5 N.Y. 2d 24, and is printed in the Appendix to this petition at page 1a, *post.* The opinion of the Appellate Division, Third Department of the state Supreme Court is reported at 5 N.Y. App. Div. 2d 117, and is printed in the Ap-

pendix at page 17a, *post*. The opinion of the state Court of Claims is reported at 4 N.Y. Misc. 2d 110, and is printed in the Appendix at page 24a, *post*.

Jurisdiction

A motion for reargument was filed with the Court of Appeals on September 13, 1958, and denied on October 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Sections 1257(3) and 2101(c). *United States* v. *Ellicott*, 223 U.S. 524, 539.

Question Presented

In order to appreciate the significance of the question now submitted to this Court, it should be borne in mind that in the thirteen original states it was the state rather than the United States that succeeded to the sovereign right to pre-empt original Indian title and thus perfect its own right to occupation of the fee. The controlling issue in the instant case as to whether a New York Act of 1856 accomplished such a result depends in turn on the answer to the composite question herewith submitted to this Court as to whether the federal Indian Intercourse Act of 1834 (now ordinarily cited as 25 U.S.C. Sec. 177) applied to the State of New York, and if so whether the New York Act complied with the requirements of the federal Act.

Statutes Involved

Sec. 12 of the Act of Congress of June 30, 1834, c. 161, 4 Stat. 730, is the most recent of a series of several similar enactments in 1790, 1793, 1799, and 1802, and is still in effect. Over the years, however, it has been the subject of two prima facie "codifications", first as R.S. Sec. 2116, and now as 25 U.S.C. Sec. 177, in both

instances with several inconsequential editorial changes but no substantial change. The text of both the original Sec. 12 and the codified Sec. 177 is set forth in the Appendix at pages 36a, 37a, *post*. Because of supposedly easier and more convenient reference, the original form of this statute is now almost always thus cited and referred to as Sec. 177, e.g., see the first of the three paragraphs of the opinion below which are quoted at page 4, *post*.

Sec. 1 of the Act of Congress of September 13, 1950, 64 Stat. 845, is in the same way ordinarily referred to as 25 U.S.C. Sec. 233, the text of which is set forth at pages 37a, *post*.

The text of Chapter 121 of the New York Session Laws of 1856 is set forth at page 38a, *post*.

Statement of the Case

Petitioner is the separate American portion of the St. Regis Tribe of Indians, residing upon its reservation in New York State. It claims that a compensable interest in Barnhart's Island in the St. Lawrence River, held by it under recognized original Indian title which had never been extinguished, was taken in 1954 when the Power Authority of the State of New York, pursuant to a state statute, appropriated that Island for a power project.

Petitioner initiated the instant proceeding in the state Court of Claims, and the present record stems from the State's motion to dismiss which was denied by that Court. The Appellate Division for the Third Judicial Department reversed, and the Court of Appeals in the judgment which is here for review affirmed the judgment of the Appellate Division. The grounds

of the motion, and the opinions of both courts (which are also printed in the Appendix) are sufficiently summarized in the opinion of the Court of Appeals at pages 10a-11a, *post*.

The New York Act of 1856 upon which the State relies as having effected extinguishment of original Indian title, and under which a payment of $5,960 was allegedly made, did not purport to comply with the treaty and federal approval requirements of the federal Indian Intercourse Act. The federal question was squarely raised at the outset in paragraphs 18 and 19 of petitioner's initial claim in the Court of Claims which are set forth in full in the Appendix at page 39a, *post*.

Neither the Court of Claims nor the Appellate Division had occasion to pass on this particular issue. But it could not be avoided by the Court of Appeals after it sustained the state on the factual issue as to the alleged $5,960 payment and held for petitioner on the only other issue which reached it. In the three concluding paragraphs of its opinion (pages 15a-16a, *post*) the Court of Appeals then held—

> "The final point raised by claimants is that even if the 1856 payment be intended as a satisfaction of the claims of the Indians to Barnhart's Island, it cannot effect that result as it is in conflict with the Indian Intercourse Act (Title 25 U.S.C.A., § 177).
>
> "In Seneca Nation v. Christie, 126 N.Y. 122, we stated (p. 142) with regard to that Act:
>
> > 'There is room for question whether the act of 1802 was intended to apply to treaties made by a sovereign State with tribes within the State

for the extinguishment of the Indian title to lands therein, * * *'

"Our language in that case was the basis of a holding in United States v. Franklin County, 50 F. Supp. 1952, to the effect that the provisions of the Indian Intercourse Act do not apply to the State of New York. No authority has been cited to us which would indicate a contrary result.

"In any event, we have here the situation where the State of New York duly negotiated the Treaty of 1796 with the various Indian tribes, including the St. Regis Tribe, in the presence of a Federal commissioner. Thereafter a dispute arose over the meaning and application of the terms of that treaty. Certainly the State had the right to settle this dispute under that treaty through a legislative grant of compensation (see N.Y. State Const., Art. 1, § 13). Thus this was not the negotiation of a new purchase of property from an Indian tribe, but rather the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty."

and upon these grounds gave judgment for the defendant State of New York.

So much for the posture of the instant case itself. But this statement would indeed be incomplete without reference to the even *more recent* and *direct conflict* afforded by the decisions of two United States Courts of Appeals. Both decisions involved another of New York's Six Nations and another major project of the same Power Authority of that state.

In *Tuscarora Indians* v. *Power Authority of the State of New York*, 257 F. 2d 885, 893, certiorari

denied October 13, 1958, October Term 1958, No. 384, the Court of Appeals for the Second Circuit held for the Indians on the question with which we are presently concerned—

> "The court below came to the conclusion * * * that neither sections 177 nor 233 of Title 25 U.S.C.A. presented any bar to the exercise of eminent domain [by the State of New York]. The wording of these two statutes does not, in our opinion lead to such a conclusion. However * * *"

The opinion then went on to hold against them, however, on an entirely separate contention of the State as to the controlling effect of certain proceedings under the Federal Power Act. The petition for certiorari dealt almost altogether with this latter issue.

In *Tuscarora Indian Nation* v. *Federal Power Commission, et al.*, F. 2d , November 14, 1958, the United States Court of Appeals for the District of Columbia in the course of direct review of those same proceedings bottomed its entire decision for the Indians on the still all-extensive applicability of Sec. 177 to New York as well as other states. The second paragraph of its opinion is especially in point—

> "The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. A long-existing statute[1] provides: 'No purchase, grant, lease, or other conveyance of lands * * * from *any* Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitu-

"[1] Rev. Stat. § 2116 (1875), 25 U.S.C.A. § 177.

tion.' (Emphasis added.) The point is further made specific in regard to lands within Indian reservations in the State of New York by a statute adopted by the Congress in 1950,[2] which conferred upon the courts of New York jurisdiction of certain actions involving Indians but contained the proviso 'That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York'. The United States Court of Appeals for the Second Circuit held that the lands involved here are protected by that provision.[3] It makes no difference how title to the land may have been acquired by the tribe."

[2] 64 STAT. 845, 25 U.S.C.A. § 233.

[3] Tuscarora Nation of Indians v. Power Authority, 257 F. 2d 885 (1958)."

For a more complete picture of the full significance of this paragraph see the Appendix at page 41a, *post*, where it is set forth in its proper perspective with the preceding and several succeeding paragraphs.

Reasons for Granting the Writ

I. The outstanding reason why this petition should be granted is that the question which it presents is the crux of a long standing and steadily worsening problem which for more than a century has been of substantial concern and importance both to a large sector of our Indian population and to the responsible authorities of at least one of our great states. This problem has now culminated in a direct conflict between the instant case and contemporary decisions of the two United States Courts of Appeals which have either direct or indirect jurisdiction within that same state, and can only be resolved by an authorita-

tive decision of this Court as to the applicability of a pertinent and "long-existing" Act of Congress.

In New York state alone, where some 6,500 Indians reside upon the 88,000 acres of eight state reservations, the seriousness to Indians and non-Indians alike of still other aspects of that uncertainty is constantly manifesting itself. Right within the past year the 1958 Report of the New York Joint Legislative Committee on Indian Affairs emphasized that

> "The leasing of reservation lands, even for short periods does involve the troublesome question of whether such agreements in the absence of approval by the Federal Government, will be upheld."

After citing 25 U.S.C. Sec. 177 as being the problem confronting the State and limiting it in its own actions with respect to Indian lands the Committee continued—

> "One way or another, it is highly desirable that this lingering uncertainty be removed in order that tribes will not be unduly hampered in deriving valuable rentals, especially in lands within the orbit of the Seaway and Power developments."

A fortiori it is all the more important that this lingering uncertainty be dispelled now that the highest state court and the highest federal court in the state have taken diametrically opposite positions. Especially so, since under our dual system of courts any question of the sort referred to by the Legislative Committee might come up in either a state court or a federal court. Or worse yet from the standpoint of orderly judicial procedure, the moving party would have the option to choose his own court.

Senate Report No. 2105, 81st Cong., similarly illustrates both the extent and the seriousness of the confusion which has persisted for more than a century, and which will become even worse confounded if the instant decision of the judicial branch of New York's government stands unreviewed. That Report recommended the passage of H.R. 4942, a bill enactment of which was sought by the *executive* branch of that same state government, and which was eventually approved August 14, 1950, 64 Stat. 442. To summarize the background as briefly as possible, it seems that the greater part of the corporate area of the city of Salamanca is located on leaseholds granted by the Seneca Indians. In the words of Chapter 787, N.Y. Session Laws of 1949—

> "Continuance of the validity of such leases is vital to the city of Salamanca and to its corporate existence"

and the statute proceeded to amend the city charter in great detail with respect to rentals, tax liens, tax sales, etc., in connection with those Indian leases.

Two excerpts from Report No. 2105 are especially in point in the present connection. One is that—

> "Obviously authorization by the Congress was also necessary, and this is the reason for H.R. 4942."

The other is most enlightening on the long history and far flung ramifications of the present question—

> "Beginning about 1850 non-Indian settlers leased reservation lands from the Seneca Indians without approval by the United States. These leases were purportedly ratified by the State of New York, but such ratification was invalidated

> by the New York Supreme Court (unreported decision set out in H. Misc. Doc. No. 75, 43d Cong., 2d sess., 1875). The act of February 19, 1875 (18 Stat. 330), ratified the existing leases for a period of not to exceed 5 years and authorized renewal of the leases for a period of 12 years. The act of September 30, 1890 (26 Stat. 558) authorized renewal of the leases for terms of not exceeding 99 years. All leases of reservation lands made under authority of these acts of Congress will expire on February 19, 1991."

That the applicability of an Act of Congress presents a federal question is self evident. And that the question in the instant case is one of substance and also of importance to both Indians and non-Indians generally is still further confirmed by the appeal from another portion of the judgment in the earlier of the above-mentioned *Tuscarora* cases, which has been filed in this Court by the Attorney General of New York in behalf of the Superintendent of Public Works of that State, and in which no order has yet been entered by this Court. (October Term 1958, No. 386).

In his Jurisdictional Statement, he posed as the first of the two questions presented—

> "(1) Is the exercise of the sovereign power of eminent domain by the State of New York as to Indian reservation lands repugnant to 25 U.S.C. §§ 177 and 233?"

and in support of that appeal, and under the heading "The Questions are Substantial", he summarized the State's concern as follows:

> "The legal questions involved the sovereign power of eminent domain of the State of New York as to Indian lands, as it has been exercised

> for more than a century and a half. The decision of the Court of Appeals for the Second Circuit impugns the validity of hundreds of past and contemporary takings of Indian lands and throws thousands of titles in the State of New York into chaos and confusion."

And in his still more recent—and quite prophetic—brief in opposition to appellee's motion to dismiss or affirm, the Attorney General of New York reiterates the substantial importance of this question to that State at such greater length that space scarcely permits its quotation at this point. For the convenient reference of the Court, however it is set forth in full in the Appendix at page 39a, *post*.

And finally there is still a further aspect of the instant case which enhances its importance as concerns all of New York's Indians. If the present opinion is to be construed as holding that the 1856 state statute conforms with the Act of Congress, and is permitted to stand, a next and very easy step might well be the possibility of abolition of petitioner's or any other state reservation by a mere *ex parte* legislative grant.

II. The conflict between the instant case and the two *Tuscarora* cases is self evident, and it is submitted that in the setting of general importance which has been developed in the preceding pages that conflict is in itself a controlling reason for the granting of this petition.

Especially so as the instant decision is also distinctly *contra* to still other decisions of the federal courts, such as *United States* v. *National Gypsum Co.*, 141 F. 2d 859 (CCA 2), an earlier New York case, and *United States*

v. *7,405.3 Acres of Land*, 97 F. 2d 417 (CCA 4) a North Carolina case. In the *Gypsum* case the Circuit Court of Appeals in holding at page 863 that Sec. 177 had not been contravened necessarily recognized its applicability to New York State—

> "It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas * * *, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and **is not in contravention of 25 U.S.C.A. § 177.** R.S. § 2116." (Emphasis supplied.)

In the *7,405.3 Acres* case the Circuit Court of Appeals at page 422 based its decision squarely on

> "A statute of the United States [which] expressly forbids the acquisition of lands of any Indian tribe by purchase, grant, lease, or other conveyance, except by treaty or convention and subjects to penalty anyone not being employed under the authority of the United States who attempts to negotiate such treaty. R.S. § 2116, **25 U.S.C.A. § 177."** (Emphasis supplied.)

And inferentially to the same effect although directed primarily to other issues *cf. United States* v. *Candelaria*, 271 U.S. 432, 441, and *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 320, in both of which this Court emphasized by full quotation the crucial opening sentence of R.S. § 2116 (now 25 U.S.C. § 177) as applicable in the first instance to New Mexico and in the second instance to Arizona. *Cf.* also *Worcester* v. *Georgia*, 6 Pet. 515, in which a statute of that state was considered to be repugnant to the earlier but substantially identical Indian Intercourse Act of 1802. To

quote briefly from the opinion of this Court by Chief Justice Marshall—

> "The treaties and laws of the United States * * * provide that all intercourse with [the Indians] shall be carried on exclusively by the government of the Union." (Page 557)

III. No court, and especially no state court, should assume to set aside so summarily an Act of Congress as inapplicable either *in toto* or in its application to a given case, without a more substantial and adequately explained justification for so doing then is offered by the three brief final paragraphs of the opinion of the New York Court. Indeed it is none too clear whether its judgment was intended to be bottomed on the next to the last of those paragraphs or on the last paragraph. But it matters little, for both paragraphs fall so far short of the above standard as to constitute in itself still further reason for review of a decision which disposes of a matter of the present substance and importance on grounds which when analyzed leave nothing but two stark and wholly unsupported *ipse dixits*. It is fully realized that this is neither the time nor the place to argue the legal merits of the decision below, but the way in which it was reached is something else again, and it is submitted that some analysis thereof is entirely in order at this stage of the case.

(a) *The Seneca case*. The quotation relied upon from that case was *dicta* in its purest form. Reference to the original opinion shows not only that the question so suggested was not explored any further, but that on the contrary the very next sentence announced the decision that—

> "assuming that the statute applies to the transaction of August 31, 1826, we are of opinion that the purchase then made was not in violation of [its] true meaning and effect * * *." (Page 143; and see page 146 to the same effect.)

That some sentence opened up an intensive review of the considerations supporting that conclusion. Especially significant, and in direct conflict with the necessarily implied holding of the instant decision was the following such consideration on the next page 144—

> "The true spirit and intent of the proviso was, we think, **to permit** the state or its agents to enter into a treaty or a convention with an Indian tribe within its borders **for the purchase of a preemptive right**, provided it was entered into in the presence of and with the approval of a commissioner of the United States appointed to attend the same, * * *" (Emphasis supplied.)

(b) *The Franklin County* case. Like the *Seneca* case, the *Franklin County* case assumes *arguendo* that the Federal Act does apply to New York State. For despite some discussion in general terms, a careful analysis of the opinion (see particularly page 156) again discloses neither an issue nor a "holding" to any such broad effect as "that the **provisions** of the Indian Intercourse Act do not apply to the State of New York". On the contrary the issue was very definitely narrowed down to "the practical **construction** placed on the Act by both the State of New York and the United States" (emphasis supplied) **with respect to necessity for the presence of a United States Commissioner.** The court held only that the Act in this respect is directory rather than mandatory, that

> "The Act, by its terms, does not require the presence of a United States Commissioner at a treaty as a prerequisite to its validity"

and that, no fraud being charged, this **"provision"** (note use of the singular) **did not apply to the particular 1824 conveyance that was in issue.**

(c) *No authority to the contrary.* The final sentence in the short paragraph devoted to this major aspect of the case to the effect that

> "No authority has been cited to us which would indicate a contrary result"

is wholly out of place in dealing with such a serious matter as setting aside an Act of Congress as inapplicable to an entire state—and by almost necessary inference to the twelve other original states as well. Especially so where as here the very injection of this pseudo-issue as to Section 177 not being applicable to the State of New York had been wholly gratuitous on the part of the Court itself, and subsequent to the submission of briefs and argument. This petitioner had had neither occasion nor opportunity to argue or cite authorities to the contrary, and its motion to reargue so that such argument, including the supervening *Tuscarora* case at 257 F. 2d 885, could be offered was denied. No case, not even the *Seneca* case (see page 13 *ante*), had so held. Nor had the respondent State itself ever so contended at any stage of the instant case. Indeed, its only references to either *Seneca* or *Franklin County* in its Court of Appeals brief in the instant case had been in support of its entirely different contention as to *construction* of the Indian Intercourse Act to the effect that

> "Nothing in [that Act] made the approbation of a United States Commissioner a prerequisite to the validity of the transaction authorized by L. 1856, ch. 121."

All of which necessarily assumed the applicability of of the Act.

(d) *The treaty of 1796.* To the extent that the decision below is bottomed on the final paragraph of the opinion, the premises on which such a conclusion as is there offered would have to be based are so inaccurately stated as to leave the alleged conclusion utterly unsupported. For if there was any "dispute" over the meaning and application of the Indians' Treaty it was wholly incidental to an international dispute of far greater magnitude. The Indians were mere pawns in a much larger "dispute" which "arose" between the United States and Great Britain, not over the effect of any Indian Treaty of 1796 but rather over the effect of the much earlier 1783 Treaty of Paris at the conclusion of the Revolution, and which was "adjust[ed]", not by any New York State Act of 1856 but by an 1822 decision of an international commission established under the 1814 Treaty of Ghent at the conclusion of the War of 1812. This concluding paragraph of the opinion is completely inconsistent with the summary in its own earlier pages (pages 1a-10a, *post*) of the facts just outlined. Note particularly the two New York State reports to the effect that Barnhardt's Island (the area here in question) "was not ceded to the United States * * * by virtue of the treaty of 1783" but "only became the property of this State by the [1814] treaty of Ghent" (pages 4a-5a, 7a-9a, *post*). Whatever else might be said for the Act of 1856, it certainly cannot

be just brushed off as "the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty". And then too, if the concluding paragraph of the opinion below is intended as a decision that nevertheless there was conformance with Sec. 177, it leaves unanswered a very pertinent question. How could a federal Commissioner present at the Treaty of 1796 have given federal approbation to a then wholly unanticipated appropriation of Indian lands sixty years later?

For many years the State of New York has admittedly been whittling away all pretense of compliance with either the letter of the spirit of a "long-existing" Act of Congress. And now this present final climactic effort on the part of its highest court calls at the very least for the exercise of this Court's supreme power of review.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals of New York State.

Respectfully,

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December, 1958.

APPENDIX

Opinion of the Court of Appeals

5 N.Y. 2d 24

ST. REGIS TRIBE OF MOHAWK INDIANS, by NORMAN TARBELL et al., Individually as Duly Enrolled Members and as Duly Elected Chiefs of the St. Regis Tribe of Indians, on Behalf of All ST. REGIS INDIANS, *Appellants*, v. STATE OF NEW YORK, *Respondent*. (Claim No. 32879.)

Argued May 14, 1958; decided June 25, 1958.

* * * * * * * * * * *

St. Regis Tribe of Mohawk Indians v. *State of New York*, 5 A D 2d 117, affirmed.

APPEAL from a judgment, entered January 3, 1958, upon an order of the Appellate Division of the Supreme Court in the third judicial department which (1) reversed an order of the Court of Claims (CHARLES LAMBIASE, J.; opinion 4 Misc. 2d 110), denying a motion to dismiss the claim, and (2) dismissed the claim.

* * * * * * * * * * *

FROESSEL, J. Plaintiffs are the duly elected chiefs of the St. Regis Tribe of the Mohawk Indians, and have instituted this action on behalf of all the members of the tribe. Their claim is that the State of New York has appropriated, pursuant to title 1 of article 5 of the Public Authorities Law, certain "land, bed of St. Lawrence River, and water rights, including inherent and intrinsic water power in such river * * * to which the claimants allege original title which has never been extinguished". Claimants assert "immemorial rights arising prior to white occupation, consisting of immemorial possession and use including original title to those rights which are the subject of the appropriation by the State of New York".

In order to ascertain the basis of the claim of the St. Regis Tribe to the land in question, it is necessary to review the relevant historical background. Prior to the

Treaty of Paris entered into at the conclusion of the Revolutionary War, the St. Regis Indians used and occupied land on both sides of the St. Lawrence River, as well as islands in the river, among which is one subsequently known as Barnhart's Island. This island, to which the St. Regis Tribe here claims title, contains 1,692 acres. In 1783 the United States and Great Britain entered into the Treaty of Paris (8 U. S. Stat. 80-83), in article II of which it was provided that the part of the northern boundary of the United States here relevant should be "along the middle of" the St. Lawrence River.

This boundary did not provide a satisfactory guide for the ascertainment of sovereignty over various islands located in the river. With respect to Barnhart's Island, the record shows that more than nine tenths of the water of the river flowed on the southeasterly side of the island; that a large portion of the island is north of the 45th degree of north latitude (one of the boundaries); that the branch of the river between the island and Canada "could sometimes in the lowest water be forded * * * [and] was never navigable for boats drawing over two feet of water [while] * * * any vessels navigating the upper lakes, can always navigate the channel between the Island and Massena".

Thus it is not surprising that after the 1783 treaty Great Britain governed Barnhart's Island, and that it was treated as a part of the township of Cornwall, the inhabitants of said island being taxed by Canada, and serving military duty at Cornwall. This administration of the island continued until 1821-1823.

In 1791 one Alexander Macomb applied to the Land Office of the State of New York for the purchase of a tract of land in northern New York State which was to include "all the Islands belonging to this State fronting the said Tract in * * * the river St. Lawrence". The surveyor general who was to survey the area covered by the application reported to the Governor: "As it is uncertain which

Islands in the River St. Lawrence fall on the New York side of the Line established by Treaty between the United States and the British Government none of those contained in the Contract with Mr. Macomb are comprehended in the above Return". On March 3, 1795, letters patent for this part of the Macomb tract were issued to one Daniel McCormick, to whom rights were transferred by Alexander Macomb.

In May, 1796 the State of New York entered into a treaty with tribes of Indians denominating themselves as the Seven Nations of Canada. In that treaty the tribes, including the St. Regis Tribe, agreed to "cede, release and quit claim to the people of the State of New York forever All the Claim Right or Title of them * * * to Lands within the said State Provided nevertheless that the Tract equal to six miles square reserved in the sale made by the Commissioners of the Land Office of the said State to Alexander Macomb to be applied to the use of the Indians of the Village of St. Regis shall still remain so reserved". Compensation in addition to the six square mile tract was provided to be paid to the Seven Nations or tribes of indians "for the extinguishment of their Claim to all Lands within the State".

In 1806, and again a year later, the question as to which islands in the St. Lawrence River were covered by the letters patent issued to McCormick was brought before the Land Office and the Legislature, the result of which was a request to the Governor "to adopt and pursue such measures as may be deemed most advisable for effecting the determination and establishment of a line of territory and jurisdiction between this state and the British government on lake Ontario and the river St. Lawrence." These efforts did not afford McCormick the desired relief, so he asked in 1814 that, until the boundary line was settled, a survey should be made to show which of the islands were "indisputably within the limits of this state. In 1817,

having obtained only one island in the St. Lawrence, he sold his rights to the remaining islands to David Ogden.

In the meantime, following the War of 1812, and in December, 1814, the United States and Great Britain entered into the Treaty of Ghent (8 U. S. Stat. 218-223). Article Sixth of said treaty provided: "Whereas, by the former treaty of peace that portion of the boundary of the United States * * * was declared to be 'along the middle of said river * * *.' And whereas doubts have arisen what was the middle of the said river, lakes and water communications, and whether certain islands lying in the same were within the dominions of his Britannic majesty or of the United States: In order, therefore, finally to decide these doubts, they shall be referred to two commissioners * * *. The said commissioners shall, by a report or declaration * * * designate the boundary * * * in conformity with the true intent of the said treaty of one thousand seven hundred and eighty-three." Article Eighth in effect stated that the rights of the Indians are not to be affected by the resettling of the boundary. On June 18, 1822, the commissioners made their report (8 U. S. Stat. 274-277), in which they decided that Barnhart's Island belonged to the United States.

We here note that in a report made by a committee of the New York State Assembly in 1850 it was stated: "It appears to your committee that prior to the settlement of the boundary line under the Treaty of Ghent, Long Island, at the outlet of Lake Ontario, lying between Cape Vincent in Jefferson County and Kingston in Upper Canada, was claimed by both the British and American authorities, and that they exercised concurrent jurisdiction over the same. That the settlement of said boundary line, as a compromise and by way of remuneration for the claims of the United States to the said Long Island, Great Britain gave up Barnhart's Island to the United States. Your committee are fully satisfied that Barnhart's Island was

ceded to the United States by way of compromise and exchange and not by virtue of the treaty of 1783."

Likewise in 1856, an Assembly committee stated: "That the commissioners, in retracing the boundary line between the United States and the British Provinces, under the Treaty of Ghent, in 1822, exchanged these two islands [Baxter and Barnhart] for others in the St. Lawrence river, and they were thereby declared to be within the jurisdiction of the United States."

In 1823 David Ogden applied for and received a patent from the State of New York covering Barnhart's Island as well as others in the St. Lawrence River. At this point, then, title to Barnhart's Island would appear to be vested in Ogden.

We now turn to the conduct of the St. Regis Tribe with respect to Barnhart's Island. In 1795 the tribe gave a lease of the whole island to George Barnhart for 999 years at an annual rental of $30. In 1806 the Indians renegotiated the lease, increasing the amount of the rental to $60 per year and shortening the term to 99 years. In March, 1817 the lease was again renegotiated, the amount of the annual rental further increased to $150. There is evidence in the record that "The Indian lease to Barnhart was recognized by the British government as conferring title according to its terms". Rents were collected from the tenants by officials of the Canadian Government from 1804 to 1822. Thus in 1823 when the State of New York issued letters patent for Barnhart's Island, that island was occupied by tenants who had substantially improved property thereon.

Shortly after the letters patent were issued to David Ogden, he instituted an ejectment suit against the then occupants. In the 1850 report of the committee of the Assembly, it was stated: "Upon the trial, the defendants offered their Indian title in evidence, but the court held that they could not look behind the patent of the State,

but were bound to recognize the sovereignty of the State, and its patents. Judgment of ouster were therefore had against the defendants. They were then forced to purchase of the Messrs. Ogden, or abandon their farms. The Ogdens charged them the full value of the land with their improvements added; thus compelling them to pay for what their own labor and money had accomplished." There was evidence that the entire island was sold to John Barnhart in 1826 for $11,434.75, but that he defaulted in payments.

In 1843 the Commissioners of the Land Office of the State of New York, to whom a petition of the St. Regis Indians "for a conveyance to them of certain islands in the River St. Lawrence, or an equivalent in money" was referred, reported: "The State of New-York has been the owner of the fee to these islands since the treaty of 1783; that they as early as the year 1791, exercised acts of ownership over the same by an actual contract of sale; that such claim of title has been uninterrupted by the repeated recognition of the validity of such original contract of sale up to the time of the execution of the same; that the delay of such execution upon the part of the State was in no manner induced by a want of confidence of the State to the title to these islands, but from the difficulty of ascertaining the true lines of territory and jurisdiction between the State of New-York and the British Provinces; that in the year 1796, 'The Seven Nations of Canada' whom the petitioners would claim to represent, by a solemn treaty then made and ratified, quit-claimed all their right and title to all lands located in the State of New York; by means of which, the whole title of such Indians to any lands within this State became forever extinguished, except to such small portion in such treaty reserved for the use in such treaty expressed.

"The commissioners of the Land-Office are of the opinion that the title to these tribes were not the less extinguished by the treaty of 1796, which was a general quit-claim of

title to all lands within the State from the fact that the lines of boundary between this State and the British Provinces had not been definitely settled, and considering character and object of the reservation made in such treaty, the reference therein to the contract made with Macomb in 1791 for the description of such reservation, and that the representatives of this original contract were parties to this treaty, they are no less satisfied that such general extinguishment of title is equally within the spirit as the letter of such treaty. The Commissioners of the Land-Office are therefore of the opinion that the petitioners have neither in law or equity the least claim to the relief sought in their petition."

In direct conflict with the views above expressed was a report of an Assembly committee on claims made by George Barnhart for compensation in 1850. That committee impliedly referred to the 1843 report of the Land Office Commissioners when it said: "It was for a long time contended in the case of Asa Baxter, who held Baxter's Island in the St. Lawrence until 1823, under precisely the same circumstances as are here narrated, that the State acquired the title to that island by a treaty made with the Indians in 1796. It is presumed that the State patented the island now in question under the same claim. The legislature of 1847, however, repudiated the claim of the State to Baxter's island under the Indian treaty of 1796, and appointed commissioners to appraise his damages by reason of his eviction by the Ogdens. An act for the payment of the award of the commissioners has passed both houses at the present session. The claim of petitioners is a more strong one if possible than that of Baxter. While his island was found to be within the limits of this State by the boundary as established by the treaty of 1783, and consequently within the letter of the Indian treaty of 1796, Barnhart's island only became the property of this State by the treaty of Ghent." An act was passed authorizing the appointment of commissioners, and the commissioners

reported a total amount of damages of $6,597. That report stated that the title of the Barnharts was "derived in the first instance from an Indian lease * * * which lease was recognized as valid by the proper authorities of Canada". They also appear to have recognized that the fee interest characterized as "a remote reversion at the end of nine hundred and ninety-nine years" was in the Indians.

In January, 1851 the Commissioners of the Land Office submitted a report to the Assembly dealing with the rights of the St. Regis Tribe in relation to Barnhart's Island. They there stated:

"The Commissioners have no peculiar means of knowing whether the two islands were within the jurisdiction of the United States before the treaty of Ghent, but it is fair to assume from the instructions to Mr. Ogden, the surveyor, that they were not included. * * *

"If the lands fell within the jurisdiction of the United States by the line established under the treaty [of Ghent], the Commissioners are clearly of the opinion that the State had no right to make any grant to the Ogdens, by which the Indians were deprived of any rents or advantages, without making compensation."

The report then continued to state the facts relating to the leasing of the island by the Indians to the Barnharts, and it concluded that if the existence of these leases could be shown, "the Commissioners entertain no doubt that justice and good faith to the Indians require the State to pay to them an annuity equal to the annual amount of rent. * * * It is probable that the Legislature will be called upon to pay a large amount of damages under the appraisal by the commissioners."

The report of the Committee on Indian Affairs made in 1856 stated: "The committee regard the title of the said Indians to said islands as unquestioned. * * * The justice and propriety of the above appropriations [to the Barn-

harts and to Baxter] was fully and elaborately discussed and conclusively shown * * *. The rights of the lessee cannot well be sanctioned and respected without, at the same time, sanctioning the title of the lessor. This proposition is too plain to the comprehension of the most indifferent mind, to require elaboration by the committee.

"It has long been the avowed, as well as the practical policy of this State, at least to deal justly by the remaining remnant of the aboriginal inhabitants of this county. We are their guardians, they our wards. We are increasing, they fast decreasing, in numbers and estate.

"In any view which the committee can take of the subject referred, they can see no good reason why an appropriation should not be made to the petitioners equal to the annual rents from 1822 to this time, together with a sum which, put at interest at the rate of 6 per cent, would produce the rents reserved; or a sum which in 1822 would have extinguished the Indian title to said islands, with interest thereon from that time, which, by the proofs, would have been $1000 for each island—

Being	$2,000
Add interest at 6 per cent for 33 years	3,960
	$5,960

Or thus:

The rents, at $120 per year for 33 years	$3,960
To which add $1,000 for each island, as commutation for title and rent	2,000
	$5,960"

In April, 1856 an Act authorizing the grant of said $5,960 "for the payment and in full of the claim of the St. Regis tribe of Indians, for the sale by the State of two certain islands in the river St. Lawrence, known as Barnhart's and Baxter's islands, which belonged to the said tribe", was passed by the Legislature. The Act further stated:

"The above sum shall be paid by the treasurer, on the warrant of the comptroller, out of any money in the treasury not otherwise appropriated, to the order of Southerland Colquhoun, the agent of the British portion of the St. Regis tribe of Indians, and William A Dart, of Potsdam, in the county of St. Lawrence, to be by them distributed to the said tribe • • •

"The said Southerland Colquhoun and William A. Dart shall before receiving any portion of the sum hereby appropriated, execute and file in the office of the comptroller of this state, a bond".

The ledger of the Comptroller indicates that on April 30, 1856 $5,960 was paid out to "St Regis Indians, in full of their claim for the sale by the State of two Islands in the River St. Lawrence, known as Barnhart's & Baxter's Is.". An affidavit in the record indicates that a search of the records of the Department of Audit and Control has failed to locate (1) any bond executed by Colquhoun and Dart; (2) an account to the Comptroller of the appropriation of the said $5,960, or any vouchers relating to the distribution of that sum.

The situation remained thus, with the Indians asserting no claim to title to the island until after the State appropriated it for the development of a power project, after which the present claim for $33,800,000 was made. The State moved to dismiss the claim on the grounds that (1) it did not state a cause of action; (2) claimants lacked legal capacity to sue the State of New York; (3) there was an incurable defect of parties, and (4) any claim which had existed had been released. The Court of Claims denied the motion, finding that there were triable issues of fact on the first and last grounds. The Appellate Division reversed on the ground that the Indians had no legal title to the real property in question, and that in any event the record showed that they had released whatever claim they had.

On this appeal, the State concedes that the claimants have capacity to sue, and they do not argue that there is a defect of indispensable parties. They do contend that (a) the treaty of 1796 divested claimants of title to Barnhart's Island; (b) the payments by the State in 1856 put an end to any liability which the State may ever have incurred, and (c) any lingering right in the Indians after 1856 was at most a right of occupancy, which the Supreme Court of the United States has held to be not compensable in appropriation proceedings. The St. Regis Tribe argues that the right, title and interest to Barnhart's Island is still in them, and that compensation for that property interest is mandated by the New York State Constitution.

We turn now to the first of the two grounds urged in this court as a basis for dismissal of the claim, to wit, that it is legally insufficient. This point having been raised by a motion under subdivision 4 of rule 106 of the Rules of Civil Practice, we may not consider matters beyond the face of the complaint except insofar as we may take judicial notice of them by common law or by statute (Richardson on Evidence [8th ed.], § 8 *et seq.*; Civ. Prac. Act, § 344-a) and thereby read them into the complaint (*Pfleuger* v. *Pfleuger*, 304 N. Y. 148; *Walsh* v. *Trustees of New York & Brooklyn Bridge*, 96 N. Y. 427, 438; *First Nat. Bank of Genoa* v. *American Sur. Co.*, 239 App. Div. 282, 284). Affidavits may of course not be considered (*Purdy* v. *McGarity*, 262 App. Div. 623; *King* v. *Kristher Mfg. Co.*, 220 App. Div. 584). The rule is otherwise as to that phase of the motion brought under subdivision 6, of rule 107, but the facts brought to the court's attention under that rule may not be considered under subdivision 4 of rule 106 of the Rules of Civil Practice (*Berwin & Co.* v. *American Safety Razor Corp.*, 282 App. Div. 922).

Considering the claim alone, then, when read in the light of relevant treaties and statutes, of which we may clearly take judicial notice, construing it liberally, and recognizing

that on its challenge of the claim for legal insufficiency the State accepts as true the relevant allegations of fact and the reasonable inferences that may be drawn therefrom (Civ. Prac. Act, § 275; *Garvin* v. *Garvin*, 306 N. Y. 118, 120; *Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451, 458; *Blanshard* v. *City of New York*, 262 N. Y. 5, 12; *Dyer* v. *Broadway Cent. Bank*, 252 N. Y. 430, 432-433), we may not say as a matter of law that no possible valid claim of title has been set forth for the reasons hereinafter stated.

Moreover, we reach the same conclusion even if we regard the official documents, such as the reports of the committees of the Legislature, as matters of which we could take judicial notice. Since both parties to this litigation, as well as the Appellate Division, seem to have proceeded upon that theory, we have considered the claim in the setting of the treaties, statutes and official documents, and its historical background. So considered, the claim presents many interesting questions.

No one disputes that the St. Regis Tribe of Mohawk Indians occupied Barnhart's Island prior as well as subsequent to the Treaty of Paris in 1783, which treaty on its face seemed to allot that island (north of "the middle of" the St. Lawrence River) to the British. Was that occupancy subsequently recognized as a right of possession by the State of New York? Did the St. Regis Tribe, by the Treaty of 1796, when it ceded its lands "within the State" (excepting the six square miles reserved), intend to include said Barnhart's Island, from which they were then collecting rent through agents of the British Government? Could the Treaty of Ghent operate retroactively as of the time of the Treaty of Paris so as to extinguish any property rights of the St. Regis Tribe? What effect did the Ogden ejectment action have on the rights of the Indians, particularly in the light of the subsequent conflicting reports of the Legislative Committees? Did the Legislature of this State recognize that the Indians had

rights by appropriating a sum of money therefor in 1856? To say the least, the rights of the St. Regis Tribe in Barnhart's Island prior to the time the Legislature made an award to them present triable issues upon this motion challenging the sufficiency of their claim.

It appears to be settled that the bare right of occupancy by the Indians (conveyable by them only to the State) is not the kind of property right which must, as a matter of due process, be compensated for by the State upon its taking title to Indian lands (*Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 279 *et seq.*; *United States* v. *Tillamooks*, 329 U. S. 48, 49; *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339, 347; *Kwash-Ke-Quon Indians* v. *United States*, 137 U. S. Ct. Cl. 372, 373-374) unless, of course, a statute authorizes it (U. S. Code, tit. 25, § 70a; *Otoe & Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, 283-285, cert. denied 350 U. S. 848; *Upper Chehalis Tribe* v. *United States*, 155 F. Supp. 226; cf. 69 Harv. L. Rev. 150-151).

The reports of the Legislative Committees, however, appear to furnish evidence of a recognition by the State of some rights on the part of the Indians in Barnhart's Island, and thus an implied expression of intent to repay them for the taking of that interest. The policy of this State, as that of others in the Union, was to deal with the original Indian nations "as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the governments which protected them * * *. These governments asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties" (3 Kent's Comm. 385 [12th ed.]). As we stated in *People ex rel. Cutler* v. *Dibble* (16 N. Y. 203, 212-213, affd. 62 U. S. 366): "They have been treated, since our first intercourse with them, as *quasi* independent nations or tribes, having governments and institutions and national attributes of their own; but,

both collectively and individually, feeble and helpless compared with the whites, and therefore needing constantly the protection and paternal care of the government." This of course does not require that compensation must be made by the courts rather than left to the consciences of the Legislatures, but it does evidence the policy of liberal dealing with the Indians on the part of the State.

As to the second ground urged by the State, the record clearly shows that the Legislature in 1856 duly compensated the St. Regis Tribe for their claim or interest in this property. It will be recalled that the Legislature had the matter brought before it by the St. Regis Tribe, who sought "an allowance to them by the State for certain islands". The tribe was cognizant of the previous awards to Baxter and Barnhart for the value of their interest in the lands, and they demanded the same treatment, although it had been previously denied them.

The committee in the Legislature recognized that the practice of the Canadian Government when dealing with interests based upon long-term leases, such as were involved with regard to Barnhart's Island, was to "issue patents therefor to the lessees, on being paid a sum which, at an interest of 6 per cent, would produce the rents reserved". Accordingly, the committee recommended an appropriation "to the petitioners equal to the annual rents from 1822 to this time, together with a sum which, put at interest at the rate of 6 per cent, would produce the rents reserved; or a sum which in 1822 would have extinguished the Indian title to said islands, with interest thereon from that time". Appellants claim that the sum appropriated was not for the purchase of the Indians' title but merely as a temporary compensation to them for loss of rentals on their lease. This contention is simply not borne out on an examination of the report of the Legislature in 1856.

It is further contended that there is no evidence that the sum appropriated was ever paid to the St. Regis Tribe,

and that a search failed to reveal the bond to have been posted by the persons who were to have turned over the money to the Indians. The loss of this document is amply accounted for, in our opinion, by the statement of the deputy comptroller that such a record as this is not among those required by statute to be kept; and that it was felt that so long as there was in existence a record indicating that the payment had been made, it was unnecessary to retain this document also. In this respect, the presence in the records of the Comptroller of the entry stating that the money had been paid on April 30, 1856 to the St. Regis Indians "in full [satisfaction] of their claim" raises a presumption that such payment was made, and obligates the claimants to come forward with more than the bare assertion that the money was not so paid (*Bean* v. *Tonnele*, 94 N. Y. 381, 386; *Conkling* v. *Weatherwax*, 181 N. Y. 258, 267; Richardson on Evidence [8th ed.], § 89; see 9 Wigmore on Evidence [3d ed.], § 2517). Being so assiduous in their attempts to obtain compensation for their rights in Barnhart's Island, it may be presumed that they would show like diligence in calling to the attention of the Legislature any failure to comply with its expressed obligations.

The final point raised by claimants is that even if the 1856 payment be intended as a satisfaction of the claims of the Indians to Barnhart's Island, it cannot effect that result as it is in conflict with the Indian Intercourse Act (U. S. Code, tit. 25, § 177).

In *Seneca Nation* v. *Christie* (126 N. Y. 122), we stated (p. 142) with regard to that Act: "There is room for question whether the act of 1802 was intended to apply to treaties made by a sovereign state with tribes within the state for the extinguishment of the Indian title to lands therein". Our language in that case was the basis of a holding in *United States* v. *Franklin County* (50 F. Supp. 152) to the effect that the provisions of the Indian Intercourse Act do not apply to the State of New York. No

authority has been cited to us which would indicate a contrary result.

In any event, we have here the situation where the State of New York duly negotiated the Treaty of 1796 with various Indian tribes, including the St. Regis Tribe, in the presence of a Federal Commissioner. Thereafter a dispute arose over the meaning and application of the terms of that treaty. Certainly the State had the right to settle this dispute under that treaty through a legislative grant of compensation (see N. Y. Const., art. I, § 13). Thus this was not the negotiation of a new purchase of property from an Indian tribe, but rather the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty.

The judgment should be affirmed, without costs.

Chief Judge CONWAY and Judges DESMOND, DYE, FULD, VAN VOORHIS and BURKE concur.

Judgment affirmed.

Order Denying Rehearing

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the sixteenth day of October A. D. 1958.

Present, Hon. Albert Conway, *Chief Judge*, presiding.

Mo. No. 469.

The St. Regis Tribe of Mohawk Indians by Norman Tarbell, & ors individually as duly enrolled members of the St. Regis Tribe of Indians, and as the duly elected Chiefs, pursuant to the Statutes of the State of New York, of the St. Regis Tribe of Indians; and on behalf of all St. Regis Indians, *Appellants*,

v.

The State of New York, *Respondent*.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars costs.

Opinion of Appellate Division

Argued, November Term, 1957; Decided, December 1957.
Before: Hon. Sydney E. Foster, *Presiding Justice*.

Hon. Francis Bergan, Hon. Philip Halpern, Hon. James Gibson, *Associate Justices*.

Appeal from an order of the Court of Claims (Lambiase, J.).

BERGAN, J.:

The State of New York has undertaken to appropriate for the development of a power project Barnhart's Island in the St. Lawrence River; the bed of the river; and intrinsic water power in the river surrounding the island. The St. Regis Tribe of Mohawk Indians, alleging an interest in the appropriated property, has filed a claim for damages for $33,800,000 in the Court of Claims. The State's motion to dismiss the claim has been denied and the court has held that the claim states a good cause of action which has not been released and which is prosecuted by competent and proper parties.

Prior to the settlement of the area by European peoples, the St. Regis Tribe had acquired by occupation and use an interest in the island in dispute and to substantial areas in the St. Lawrence Valley. The present interest of the St. Regis Tribe as pleaded is that "claimants make claim of immemorial rights arising prior to white occupation, consisting of immemorial possession and use, including original title to those rights which are the subject of the appropriation by the State of New York."

The Treaty of Paris which in 1783 ended the Revolutionary War, laid down a boundary between the United States and Canada as "along the middle" of the St. Lawrence River. The literal location of this "middle line" ran south of Barnhart's Island, which was thereupon regarded as being in Canada. The line was more definitely laid down in 1822 by Commissioners representing both the United States and Great Britain "in conformity with the true intent" of the treaty of 1783.

This determination was made in June, 1822; and was in pursuance of the "treaty of peace and amity" between the two nations at Ghent in 1814 which, among other things, settled the War of 1812. By the 1822 determination of the "true intent of" the Treaty of Paris, Barnhart's Island

was located south of the International Boundary and thus in the State of New York.

In 1791 the New York State Commissioners of the Land Office made a contract with Alexander Macomb for sale to him of land along and islands in the St. Lawrence. From this contract was exempted a described area to be set apart as a reservation for the St. Regis Indians.

Five years later, in 1796 the St. Regis and other tribes of Indians ceded to the State of New York "all lands within the State". From this cession was excepted the same parcel to be used as an Indian reservation referred to in the Macomb contract and some other exceptions not here material. Barnhart's Island was not excepted from the general cession from the St. Regis Indians to the State.

Thus the Indian title to Barnhart's Island, if within the State of New York, must be deemed to have been intended to have been conveyed to the State by the St. Regis Tribe by the general cession in 1796. In the previous year the St. Regis Tribe had leased the island to one G. Barnhart for 999 years; modified in 1806 by a further lease for 99 years which would by its terms have expired in 1905. A memorial of this lease was recorded in Canada.

In the meantime Macomb's assignees pressed the State for a patent for the islands in the St. Lawrence which the State had agreed to sell under the 1791 contract; but although the Attorney General was of opinion in 1806 that the contract was still valid, the Legislature by resolution expressed the view that until the line of territory and jurisdiction in the river be determined and established, "no grant can with propriety be made thereon" as to such islands "as may probably fall within the limits of this state" and requested the governor to seek to effect a determination of the line. (Assembly Journal, 30th Session, 1807, pp. 328, 329.)

The boundary line having been settled in 1822 by Commissioners in pursuance of the Treaty of Ghent, as it has

been noted, the State in 1823 patented Barnhart's Island to D.A and G. Ogden, then the assignees of the Macomb contract of 1791.

The Barnharts being in possession of the island under the St. Regis lease of 1795, the Ogdens sued them in the New York Supreme Court in ejectment. The Indian lease was offered by the defendants in support of the right of occupancy; but the court held the patent from the State was controlling and judgment of ejectment was entered against the occupants in favor of the State's patentees.

This was a judicial determination between parties holding under Indian rights and those holding under a State patent to the same land that the patent was paramount. The predecessors of the present claimants were not parties to the action in ejectment and not bound in the sense of *res judicata* by that judgment; but the judgment is a guide to the contemporary view of the nature of the legal issues involved and of the prevailing rights under the Indian claim of title and to the State's title; and it is a precedent of direct pertinence to these issues.

Since the State's title had been held to prevail on the island, both the St. Regis Tribe and their lessee who had lost the law suit petitioned the Legislature for relief. The Indians asked for a conveyance "of certain islands in the River St. Lawrence, or an equivalent in money".

This was referred to the Commissioners of the Land Office who examined the question and, in a report to the Legislature in 1843, were of opinion that it had been intended by the Indians in the treaty of 1796 to release all claim to islands in the State including such as were definitively brought within the State by the settlement of the boundary line and that "such general extinguishment of title is equally within the spirit as the letter of such treaty." The Commissioners contended the petitions to the Legislature "have neither in law or equity the least claim to the relief sought in the petition."

Nevertheless, on renewal by the St. Regis Indians of their petition in 1856 the Assembly Committee on Indian Affairs recommended an appropriation of $5,960 in compensation for Barnhart's and another island; and this sum was appropriated and paid. In the archives of the State are appropriate entries from the Comptroller's records of both warrant and payment of $5,960 to the St. Regis Indians "in full of their claim for the sale by the State of two islands in the River St. Lawrence, known as Barnhart's and Baxter's islands $5,960.00".

On the State's motion to dismiss the claim the Court of Claims found that a triable issues of fact on the question of title or interest was presented which precluded dismissal as a matter of law. The court was in agreement with the argument advanced by the State that the original right of occupancy of land by Indian tribes is not the kind of property right for the extinguishment of which the State is required to pay compensation. But it held that there would be an open question of fact to determine, as we read the court's opinion, whether there had been such a "recognition" of the Indian title by New York and by the British or Canadian governments, the predecessors of New York in sovereignty, as "to make such interest and rights compensable."

A triable issue of title or interest does not demonstrate itself. The record of public transactions between the St. Regis Indians and the State shows no title by these Indians in Barnhart's Island cognizable in a firmer or different fashion than those arising from Indian custom and usage generally; and the prohibition by the British government on October 7, 1763 against further occupation of Indian lands by the subjects of the King without official permission was not a "recognition" of a legally enforcible title to the Indians whose right to usage of their lands was thus protected by the British government; and it certainly cannot be held to have operated to limit the

rights of the British government itself in respect of those lands nor the rights of the State as the successor to its sovereignty.

The recognition of such Indian rights by the New York Constitution; by its statute or decisional law in such a manner as to make compensable the taking of these claimed rights presents neither a triable issue of fact nor an admissible argument of law.

The constitutional provision relied upon (N. Y. Const., Art. I, section 13) prohibits the purchase or contract of sale with Indians of any lands unless by the authority and with the consent of the Legislature. This provision, coming from the first Constitution of 1777, represents substantially the same policy announced by the British government in 1763; it imposes a limitation upon private land dealing with Indians. It cannot be read fairly to impose a limitation upon appropriation of Indian lands by the sovereign or to be any recognition whatever of title in the Indians assertable against the sovereign.

Nor can the decisional law relied upon be deemed such a "recognition" of title. The decision, for example, in *Seneca Nation* v. *Christie* (126 N. Y. 122) lays down the rule that the establishment of the Federal government did not deprive New York of sovereign power in dealing with Indians within its borders; and that grants made under the aegis of State authority and treaty were binding on the Indian successors of the grantor. The decision in *Goodell* v. *Jackson* (20 Johnson 486) was an elaborate judicial demonstration by Chancellor Kent for the Court of Errors against the right of a private white person to take a good title from an Indian without consent of the Legislature under the constitutional limitation; and *Lee* v. *Glover* (8 Cowen 189) holds the same thing.

The case law in New York certainly does not seem to give support or comfort to the argument advanced for

it that it amounted to a recognition by the State of an Indian title for which the State must pay to extinguish.

The statute law, Public Authorities Law, section 1007, subd. 10, and Highway Law, section 30, subds. 2 and 14, authorizing certain takings for public uses and defining rights to be taken must be deemed in fair context to refer to rights recognized at law and not itself to amount to a new recognition or original Indian titles or make their taking compensable.

The Federal decisional law is clear upon the point that as against the United States, the right of occupancy to land by Indian tribes is not a property right for the extinguishment of which the sovereign is required to pay compensation (*Tee Hit Ton Indians* v. *United States*, 348 U. S. 272; *United States v. St. Fe Pac. Co.*, 314 U. S. 339; *Shoshone Indians* v. *United States*, 324 U. S. 335).

The obligation to pay compensation for the exercise of public power in the taking of private property imposed on the United States (U. S. Constitution, Amendment V) and on the State (N. Y. Const. Art I, section 7) is identical in scope and effect. The constitutional principles which underlie the freedom of action of the United States in this area apply with equal force to the government of New York within its own jurisdiction.

Besides this, it was clearly the intention of the United States and Great Britain to settle a line in the St. Lawrence River left in doubt and dispute following the Treaty of Paris; and the broad sweep of conveyance of all lands by the St. Regis Indians to the State of New York in 1796 with specific reservations not including Barnhart's Island must be construed as intending to convey land later definitively placed on the New York side of the disputed border. No suggestion of any intent to be more specific about the line of conveyance appears in the Indian treaty of 1796 than appears in the accord between the two countries at Paris in 1783.

Moreover, the record shows that whatever claim may have existed has been released; and the facts in this respect being undisputed and depending on documentation and public records, no triable issue on such release is shown. The intent of the St. Regis Indians to discharge whatever title they might claim to have been left over from the 1796 cession is made manifest by the petition to the Legislature, renewed in 1851 after it had been rejected on a consideration of the merits by the payment of the 1856 appropriation. We see no triable issue in all this.

The order should be reversed and the claim dismissed without costs on the following grounds: (1) that no legal title to the real property asserted in the claim exists in claimants; and (2) the claim has been released and discharged.

Opinion of the Court of Claims

(Same Title)

LAMBAISE, *J.*

This is a motion by the State of New York to dismiss the above entitled claim upon the following grounds: (1) That the claim does not state a cause of action; (2) that claimant lacks legal capacity to sue the State of New York in respect to the subject matter of the claim, and that the Court of Claims lacks jurisdiction to entertain the claim; (3) that an incurable defect of parties precludes the Court from taking jurisdiction of the claim; and (4) that any claim which may have existed has been released. No other grounds for dismissal are urged.

It is alleged in the claim, among other things:

> "That this claim is for the permanent appropriation, pursuant to Article 5, Title 1 of the Public

Authorities Law of the State of New York, Section 1001 *et seq.* of land, bed of St. Lawrence River, and water rights, including inherent and intrinsic water power in such river, all of which is more particularly defined herein, and to which the claimants allege original title which has never been extinguished." (Claim, para. 4).

"That the question which is the subject of this action is one of common and general interest to all St. Regis Indians and that the claimants are the duly elected Chiefs of the St. Regis Tribe of Mohawk Indians and bring this action against the State of New York individually as duly enrolled members of the St. Regis Tribe of Indians, as elected Chiefs of the said Tribe, and on behalf of all St. Regis Indians." (Claim, para. 3.)

"That claimants make claim of immemorial rights arising prior to white occupation, consisting of immemorial possession and use including original title to those rights which are the subject of the appropriation by the State of New York." (Claim, para. 5.)

And it further alleges that:

"The particulars of claimants' damages are as follows: Permanent appropriation of land known as Barnhart's Island located in the St. Lawrence River, County of St. Lawrence, State of New York; permanent appropriation of the bed of the St. Lawrence River surrounding the said Barnhart's Island and within the respective boundaries of 1783 and 1822; and permanent appropriation of the water power inherent and intrinsic in the St. Lawrence River, totaling in all to the sum of Thirty-three Million Eight Hundred Thousand ($33,800,000.00) Dollars." (Claim, para. 22.)

IN GENERAL

As to Ground No. 1, only the pleadings may be considered (Rules of Civil Practice 106); and as to the remaining grounds, it is proper to consider affidavits in connection with the same; and, in fact, affidavits and documents have been submitted upon, have been used by the parties, and have been considered by the Court on these grounds.

In determining whether a complaint is legally sufficient, nothing but the pleading may be considered; affidavits are not permitted. King v. Krischer Mfg. Co., Inc., 220 App. Div. 584; 222 N. Y. S. 66; Purdy v. McGarity, 263 App. Div. 623-30; N. Y. S. 2d 966.

A pleading challenged for legal insufficiency must be construed broadly and liberally. Civil Practice Act, Sect. 275; Wainwright & Page Inc. v. Burr & McAuley, 272 N. Y. 130; Condon v. Associated Hospital Service of New York, 287 N. Y. 411.

The allegations of fact stated in the complaint are, for the purposes of this motion, assumed to be true (Locke v. Pembroke, 280 N. Y. 430; Hart v. Hart, 274 App. Div. 836, 80 N. Y. S. 2d 480); but not the legal conclusions drawn by the pleader nor his interpretation of any statutes involved in the action. McCormick v. Westchester Lighting Co., 142 Misc. 27; 252 N. Y. S. 849.

In admitting the truth of a pleading challenged for legal insufficiency, only the material and relevant facts properly pleaded therein are assumed to be true. Conclusions of law or the construction of a statute or the state of the law are not admitted. (Hanna v. Lichtenbein, 225 N. Y. 579; Pelo v. Stevens, 66 Misc. 35, 120 N. Y. S. 227, 230); nor does the motion challenging legal sufficiency admit facts of which the court will take judicial notice as being untrue. Baxter v. McDonnell, 18 App. Div. 235, 45 N. Y. S. 765.

A pleader must plead facts, not conclusions. Walrath v. Hanover Fire Ins. Co., 216 N. Y. 220, 224. A conclusion without the facts is an immaterial allegation; a conclusion of law is unavailing for any purpose. Greeff v. Equitable Life Assurance Society, 160 N. Y. 19, 29; Maylender v. Fulton County Gas and Electric Co., 131 Misc. 514, 517; 227 N. Y. S. 209, 216; Malcolm E. Smith, Inc. v. Zabriskie, 84 N. Y. S. 2d 362.

We shall consider the particular grounds for dismissal in the order hereinbefore set forth:

Ground No. 1: The claim does not state a cause of action.

This ground for the motion presents a question as to the nature of claimant's title or interest less than title, if any, which has been pleaded in the claim. Concededly we are not dealing with "Reservation Lands".

Applying the foregoing established principles of construction to the allegations of the claim, we have concluded that the claim alleges "Original Indian Title" and "Recognized Indian Title", and alleges further that either is compensable. The State of New York denies that claimant has any compensable interest.

"The nature of the Indian title to lands on this continent was established by the system of public law adopted by European nations regulating their possessions here. It became the recognized principle that discovery followed by possession vested in the sovereign by whose subjects the discovery was made the absolute title to the soil of the lands within the limits of the discovered territory, subject however to the right of occupation by the Indian tribes, which could only be extinguished by their voluntary consent, unless forfeited under the laws of war. It was a necessary sequence to the claim that the sovereign had the ultimate title to the soil, that the right to extinguish the Indian occupation was exclusively vested in

the sovereign. The Indians were held to be incapable of alienating their lands except to the crown, and all purchases made from them without its consent, were regarded and treated as absolutely void. The title of the crown was subject to grant, but a grant from the crown only conveyed the fee subject to the right of Indian occupation and when that was extinguished under the sanction of the crown, the possession than attached to the fee and the title of the grantee was thereby perfected. These general principles were announced by Chief Justice Marshall in the great case of Johnson v. M'Intosh (8 Wheat. 543), which has ever since been regarded as a sound exposition of the nature of Indian titles.

"The several colonial charters undertook to define the territorial limits of the respective colonies. In many cases the boundaries were indefinite and in some cases conflicting. The crown, however, except in case of proprietory charters, exercised the right of making grants of unappropriated lands within the chartered limits of the colonies, although the right of soil and jurisdiction was vested in the colonial governments. On the declaration of independence, the colonies became sovereign states. They were so acknowledged by the treaty of peace of 1783, and Great Britain by that treaty 'relinquished all claims to the government, property and territorial rights' within the several colonies. It is the received opinion that the colonies succeeded to the title of the crown to all the ungranted lands within their respective boundaries, with the exclusive right to extinguish by purchase the Indian title, and to regulate dealings with the Indian tribes." The Seneca Nation of Indians v. Harrison B. Christie, 126 N. Y. 122, 135-136; Tee-Hit-Town Indians v. United States, 348 U. S. 272.

This right of occupation by the Indian Tribes is not a property right, but amounts to a right of occupancy which the sovereign grants and protects against intrusion by

third parties, but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legal enforceable obligation to compensate the Indian. Tee-Hit-Ton Indians v. United States, *supra*, 279. And "The manner, method and time of extinguishment raise political, not justiciable issues." United States v. Santa Fe Pacific R. Co., 314 U. S. 339, 347. In our opinion, "Original Indian Title" is not compensable. However, claimant tribe contends that its interest and rights in the land in question were sufficiently recognized by Great Britain and by Canada in their times and by the State of New York so as to make such interest and rights compensable; and that the Indians of New York in reference to compensability for the taking of their lands in this State have the protection of the State Constitution, Art. I, Sect. 13, and of the Indian Intercourse Act, 25 U. S. C. A. Sect. 177.

Where the sovereign has declared that thereafter Indians are to hold certain lands permanently, compensation must be paid for subsequent taking. There is no particular form for recognition of Indian right of permanent occupancy. It may be established in a variety of ways, but there must be the definite intention by constituted authority to accord legal rights, not merely permissive occupation. Tee-Hit-Ton Indians v. United States, *supra*, pages 278-279; Hynes v. Grimes Packing Co., 337 U. S. 86, 101.

The State of New York contends that at a Treaty held in the City of New York on May 31, 1796 (7 Stat. 55), the Seven Nations of Canada represented by numbers of the Caughnawaga and St. Regis Tribes ceded and released to the State of New York any and all interest to lands within the State of New York, excepting certain lands set aside as a reservation for the St. Regis Tribe of Mohawk Indians, which lands are not concerned in this claim; and that Barnhart's Island and any interest therein

which claimant tribe may have had was extinguished by the Treaty and was ceded to the State of New York. Claimant, The St. Regis Tribe of Mohawk Indians, does not deny the making of the Treaty, but maintains that upon the record such Island was not ceded, and its title to and interest therein was not extinguished by said Treaty.

We believe that a triable issue on title or interest is presented which may not be summarily disposed of, and we deny the motion on this specific ground.

GROUND No. 2: Claimant lacks legal capacity to sue the State of New York in respect to the subject matter of the claim, and that the Court of Claims lacks jurisdiction to entertain the claim.

It is the contention of the State that unless there is statutory authority no action for damages caused by the appropriation of tribal property might be brought by a tribe as an entity, or by an individual in a representative capacity on behalf of the tribe, or by an individual on behalf of himself insofar as his interests in such tribal property are concerned. This point made by the State is not disputed by the claimant, and in its main brief (page 38) claimant states; "That an Indian tribe may not sue as a legal entity except by statutory permission is not disputed." However, it contends that the Court of Claims Act of the State of New York and Constitutional provisions relative to the Court of Claims, section 30 of the Highway Law, and section 1007, subd. 10, of the Public Authorities Law provide this statutory permission and authority, and that the interests involved in this claim are within the jurisdiction of this Court.

Section 30, subdivision 2, of the Highway Law provides as follows:

> "The superintendent of public works, for and in behalf of the people of the State of New York may acquire by appropriation any and all property neces-

sary for the construction reconstruction and improvement of state highways and bridges or culverts on the state highway system, including the appropriation of property for drains, ditches, spoil banks, gravel pits and stone quarries; also for the removal of obstructions, improvement of sight distances; also for appropriation of property for the reconstruction of existing highway-railroad separation structures and for the separation of highway-railroad grades on newly laid-out highways; and for other purposes to improve safety conditions on the state highway system. The term 'property' as used in this section is defined to include lands, waters, rights in lands or waters, structures, franchises and interest in land, including lands under water and riparian rights, and any and all other things and rigths usually included within the said term and includes also any and all interests in such property less than full title, such as, easements permanent or temporary, rights-of-way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right legal or equitable. The manner of appropriation, including method of obtaining possession, shall be as hereinafter set forth."

And subdivision 14 of said law provides in pertinent part:

"The owner of any property, easements, interests or rights appropriated, may present to the court of claims a claim for the value of such property appropriated and for legal damages, as provided by law for the filing of claims with the court of claims. * * *".

Section 1007, subdivision 7, Public Authorities Law provides, among other things:

The authority may, at its option, acquire such real property within the state of New York, under the general condemnation law, or, in the event it is a licensee of the federal power commission it may acquire such

real property as is necessary for its purposes through the exercise of the right of eminent domain as provided in section twenty-one of the federal power act, * * *."

And Section 1007, subdivision 10, Public Authorities Law, provides among other things:

"Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by the superintendent with the approval of the authority, or by the court of claims as provided in said section thirty. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before said court. * * *."

A statute intending to authorize the exercise of the right of eminent domain would be clearly unconstitutional where it makes no provision for compensation to those whose private property is to be taken for public use. While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. Litchfield v. Bond, 186 N. Y. 66, 74; Sweet v. Rechel, 159 U. S. 380, 406.

The foregoing cited and quoted statutes authorize the exercise of the power of eminent domain and would be clearly unconstitutional if they made no provision for compensation to those whose private property is to be taken for public use. Litchfield v. Pond, *supra*. The Constitution of the State of New York provides that just compensation shall be paid for any taking. (Constitution, Article I, Sect. 7). There is no restriction or limitation set forth in the quoted statutes upon the legal status of the owner

from whom the property is taken, and implicit therefor, if not explicit, therein is the right of an owner to have his day in court to prove his title or interest and to establish his damages.

In our opinion, therefore, the statutes above cited and quoted constitute statutory authority for claimant, The St. Regis Tribe of Mohawk Indians, to sue its alleged claim. It is true that under section 8 Court of Claims Act the State of New York has waived its sovereign immunity. That waiver, however, merely applies to areas where before its enactment a definition of sovereign immunity might have been interposed (Fullerton v. City of Schenectady, 285 App. Div. 545); and by section 9 of the same act jurisdiction of the broadest character in connection therewith is conferred on the Court of Claims. Needless to say it must not be construed that thereby the State concedes its liability herein in favor of the claimant, or creates a cause of action in its favor where none existed prior to said enactments. The Court of Claims Act leaves open the question of the State's liability and merely gives a remedy to enforce a liability and submits the State to the jurisdiction of the Court subject to its right to interpose any lawful defense. Smith v. State, 227 N. Y. 405, 409; McMahon v. State, 178 Misc. 865.

The motion must be and hereby is denied on this particular ground. We limit our decision on this ground specifically to the cited and quoted statutes as they authorize or may authorize the exercise of the right of eminent domain.

Ground No. 3: An incurable defect of parties precludes the Court from taking jurisdiction of the claim.

It is the position of the State of New York that if any Indian title to Barnhart's Island for the alleged appropriation of which claimant has filed this claim was existent at the time of the appropriation of the Island, claimant

tribe, The St. Regis Tribe of Mohawk Indians, is not the only Indian tribe with an interest in the Island; that within the St. Regis Tribe of Mohawk Indians there are two tribes, viz.; that on the American side of the International boundary line, and the other on the Canadian side of said line (Matter of Herne, *et al.*, 133 Misc. 286, 287); and that assuming arguendo and for that purpose only claimant tribe has an interest, then the Canadian St. Regis Indian Tribe and possibly the Caughnawagas, another Indian Tribe, which was also represented at the making of the Treaty of 1796, also have an interest and must be represented herein, failing which there is an incurable defect of parties claimant which precludes the Court from assuming jurisdiction and adjudicating this claim.

Claimant tribe, on the other hand, contends that assuming arguendo that it does not represent all outstanding interests, nevertheless its claim for an undivided interest may be heard, and that the State, under existing practice, has the right to interplead the holder of all other outstanding interests. While we do not agree entirely with claimant tribe in its reasoning, we agree with it in result on this point.

Section 194 of the Civil Practice Act is as follows:

> "Sect. 194. Joinder of parties in interest. Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants except as otherwise expressly prescribed in this act. If the consent of anyone who should be joined as a plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint."

Assuming, as is contended by the State of New York and not denied by claimant, that the St. Regis Indian Reservation is located partly in the Town of Bombay, U. S. A., and partly in the Dominion of Canada; that one set of chiefs

is chosen for the territory and inhabitants on the American side of the international boundary line and another and different set for the people and territory on the Canadian side; that the government, the officials and all regulations are entirely separate and distinct; that no jurisdiction is exercised or attempted beyond the international boundary line by either; and that the two tribes have a separate governmental existence (*In re* Herne *et al.*, *supra*), and that the foregoing section applies to the claimant tribe's situation, it is barred completely from any remedy and is unable to enforce its claim if it has any claim. Claimant tribe cannot sue in Canada as the claim must be brought in the Court of Claims. The State of New York has no jurisdiction over the St. Regis Indian Tribe of Canada, and an order to bring them in and to make them a party to this action would be futile and meaningless. "It is apparent, therefore, that this section of the Civil Practice Act has limitations and must be interpreted so as to direct an enforceable act. To command a party to be brought in where there is no process to bring him in and no jurisdiction over him lacks sense." Parties who are united in interest must be joined as plaintiffs or be brought into the action as defendants, pursuant to this section 194 of the Civil Practice Act, where they are within the jurisdiction of the court, so that the judgment may effectually bind them. Where any of such parties are without the state and cannot be served or brought into the action effectually, they need not be parties, and an order would be improperly granted which directed that they be made parties. This is the interpretation which the courts have given to this section and which we approve. (Citing cases) * * *". Keene, *et al.* v. Chambers, *et al.*, 271 N. Y. 326, 330, Howard v. Arthur Murray Inc. *et al.*, 281 App. 806, and cases cited therein.

We are of the opinion that the claim may not be dismissed upon this specific ground, and we therefore deny the motion as particularly based thereon.

GROUND No. 4: Any claim which may have existed has been released.

On the basis of the filed claim, affidavits and documents submitted herein and used by the parties in their argument and in their submission of this motion, it appears to us that a question of fact is involved, the State claiming that any claim in the claimant-tribe which may have existed has been released, and claimant-tribe claiming that its claim has not in any way been released and as of the date of the appropriation was and now is valid and subsisting. The question, therefore, it seems is one of fact to be resolved upon a trial and may not be disposed of summarily upon this motion. The motion, therefore, should be denied as based on this enumerated ground.

The motion, therefore, must be and hereby is in all respects denied.

Submit order accordingly.
Dated: December 27, 1956.

Text of Statutes Involved

Sec. 12 of the Act of Congress of June 30, 1834; c. 161, 4 Stat. 730:

> SEC. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, such person shall forfeit any pay one thousand dollars: *Provided, nevertheless*, That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority

of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

25 U. S. C. Sec. 177:

§ 177. *Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. (R.S. § 2116.)

25 U. S. C. Sec. 233:

§ 233. *Jurisdiction of New York State courts in civil actions.*

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such States: * * * *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the

State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

Chapter 121 of the New York State Laws of 1856:

CHAP. 121

AN ACT for the payment of damages to the St. Regis tribe of Indians for the sale by the State of two Islands in the river St. Lawrence, known ase Barnhart's and Baxter's Islands, and which belonged to them.

Passed April 7, 1856, three-fifths being present:

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. The sum of five thousand nine hundred and sixty dollars is hereby appropriated for the payment and in full of the claim of the St. Regis tribe of Indians, for the sale by the State of two certain islands in the river St. Lawrence, known as Barnhart's and Baxter's islands, which belonged to the said tribe.

§ 2. The above sum shall be paid by the treasurer, on the warrant of the comptroller, out of any money in the treasury not otherwise appropriated, to the order of Southerland Colquhoun, the agent of the British portion of the St. Regis tribe of Indians, and William A. Dart, of Potsdam, in the county of St. Lawrence, to be by them distributed to the said tribe, in the same manner as annuities are now distributed to them.

§ 3. The said Southerland Colquhoun and William A. Dart shall before receiving any portion of the sum hereby appropriated, execute and file in the office of the comptroller of this state, a bond with sufficient sureties to be approved by the comptroller, in the penal sum of ten thousand dollars, conditioned for the faithful performance of their duties under this act. And

the said Southerland Colquhoun and William A. Dart shall within one year after they have received from the treasurer the said sum of five thousand nine hundred and sixty dollars, render an account to the comptroller under oath of the appropriation and distribution of said money and the manner thereof, together with the vouchers therefor.

Miscellaneous Excerpts

From petitioner's Claim in the Court of Claims (pages 235-236 of certified Papers on Appeal):

"18. That to the best of claimants' knowledge, information and belief the State of New York did not enter into a treaty whereby it abrogated the original title of the claimants to the said Barnhart's Island and its surrounding waters and, therefore, in no event could the said statute of the State of New York (Chapter 121 of the Laws of the State of New York for 1856) and any compliance therewith, operate to extinguish the original title of the claimants or be in derogation thereof."

"19. That to the best of claimants' knowledge, information and belief, the State of New York has wholly ignored and failed to extinguish the original title of the St. Regis Indians to that island known as Barnhart's Island, bed of stream and water rights adjacent thereto, including inherent and intrinsic water power in the St. Lawrence River, and that the St. Regis Tribe of Indians have not ceded, released or conveyed, by treaty or any other conveyance, such original title."

* * * * * * * * * *

From brief of Attorney General of New York in first Tuscarora Case (October Term 1958, No. 386), *page 8:*

"With regard to the public importance of the questions presented, the Court's attention has been drawn to the chaos which will ensue respecting the validity of past and contemporary acquisitions of Indian land, respecting the applicability of the Indian Intercourse

Act to the State of New York, and respecting the acquisition of non-Indian lands by the State of New York, pursuant to N. Y. Public Authorities Law § 1007 (10) and Highway Law § 30 (Jurisdictional Statement, pp. 12-13). This statement was truly prophetic. In *St. Regis Tribe of Mohawk Indians* v. *State of New York*, 5 N. Y. 2d 24 (1958) a motion was made in the Court of Appeals of the State of New York for re-argument, based in part on the decision of the Federal Court of Appeals in the instant matter. The motion was denied on October 9th, but it would come as no surprise if the next step in the proceeding involved an application to this Court for certiorari. In *State Tax Commission* v. *Barnes*, a proceeding pending in Franklin County, New York, the St. Regis Indians have moved to have themselves declared immune to the payment of the State income tax, basing their position on the determination of the United States Court of Appeals in the instant proceeding. There has been a decision in this matter in favor of the State, but an appeal is anticipated. As to the situation respecting non-Indian lands, it may be noted that in five summary (dispossess) proceedings, commenced under the authority of Highway Law § 30, subd. 12, the right of the petitioner (Superintendent of Public Works) to maintain the proceedings was challenged. The petitions were granted and final orders issued. The Court wrote an opinion. In drawing this Court's attention to these occurrences, our purpose has been to demonstrate the substantiality of the questions presented. Review by this Court is not sought merely for the purpose of having this Court declare principles or rules of law for the government of future cases, but which cannot affect the matters in issue in the instant case. The matters in issue in the instant case involve the title of the State of New York. The Court of Appeals in the instant case has held that by virtue of the applicability of the Indian Intercourse Act to the State of New York the latter does not possess the inherent sovereign power to acquire Indian reservation lands. As a result, it has set aside and annulled the title acquired by the State of New York. Certainly this is an issue which is very

much alive and which can be seriously affected in the instant case by a determination of this Court."

* * * * * * * * *

From opinion of U.S. Court of Appeals for the District of Columbia in second Tuscarora case (filed November 14, 1958):

"PRETTYMAN, *Chief Judge:* The issue here is whether the New York Power Authority has a valid license from the Federal Power Commission to build a dam that will flood certain lands of the Tuscarora Indians. We are of opinion that the case must be remanded to the Federal Power Commission for further consideration. In order that the litigation may not be delayed more than is necessary, we shall state in this memorandum the propositions which lead to our conclusion, without taking the time to complete an opinion in the customary form.

"I

"The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. A long-existing statute[1] provides: 'No purchase, grant, lease, or other conveyance of lands * * * from *any* Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.' (Emphasis added.) The point is further made specific in regard to lands within Indian reservations in the State of New York by a statute adopted by the Congress in 1950,[2] which conferred upon the courts of New York jurisdiction of certain actions involving Indians but contained the proviso 'That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York'.

"[1] REV. STAT. § 2116 (1875), 25 U.S.C.A. § 177.

"[2] 64 STAT. 845, 25 U.S.C.A. § 233.

The United States Court of Appeals for the Second Circuit held that the lands involved here are protected by that provision.[8] It makes no difference how title to the land may have been acquired by the tribe.

"The statement in the letter of the Assistant Secretary of the Interior, referred to in the Commission's order denying rehearing, that these reservation lands are under state jurisdiction, is patently in error in so far as alienation is concerned.

"To validate the taking of these lands by the Power Authority of New York for reservoir purposes, the consent of the United States must be found in some manner.* * *

"We are not alone in concluding that the Tuscaroras' reservation clearly is entitled to the protections accorded without distinction to Indian tribal lands elsewhere. In *United States* v. *7,450.3 Acres of Land*[12] Judge Parker laid down the doctrine that the guardianship of the United States over the Indians, which includes protection of the Indians from improper alienation of their lands, constitutes sufficient interest in those lands to require congressional expression of the consent of the United States to such alienation. We concur in that view. * * *"

"[8] Tuscarora Nation of Indians v. Power Authority, 257 F. 2d 885 (1958)."

"[12] 97 F. 2d 417 (4th Cir. 1938)."

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(90)

IN THE

Supreme Court of the United States

No. 613—October Term, 1958

THE ST. REGIS TRIBE OF MOHAWK INDIANS,
Petitioner,

v.

THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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We oppose the granting of the petition because we maintain that the decision of the New York Court of Appeals (5 N. Y. 2d 24, 152 N. E. 2d 411; reargument denied 5 N. Y. 2d 793, ____ N. E. 2d ____) rests on more than one non-federal ground adequate to support it.

(1)

The power of New York State to take the lands of the St. Regis Indians is not at issue. The decision below was adverse to them because (1) they failed to prove they had title to the lands appropriated, title having been conveyed by the Indians to the State, if not in 1796, as is arguable, then certainly not later than 1856—the fact of the conveyance by the Indians to the State in 1796 being implicit in the language of the Court below (5 N. Y. 2d 24, at p. 40) to the effect that the 1856 transaction "was not the negotiation of a *new* purchase of property from an Indian

tribe, but rather *the adjustment of a claim* that had arisen as the result of the ambiguous language of the 1796 treaty." (Italics ours); and (2) the claim before the Court was an attempt by the St. Regis Indians to be paid a third time for the same conveyed lands.

(a)

The 1796 Treaty contains the following language in its Preamble (R. 67):

> "The Agents for the State having in the presence and with the approbation of the Commissioner proposed to the Deputies for the Indians the Compensation hereinafter mentioned for the extinguishment of their Claim to all Lands within the State and the said Deputies being willing to accept the same. * * *"

The consideration is set forth at R. 67-68 and was upwards of Twelve hundred pounds.

(b)

The Indians petitioned the Legislature in 1856 to be paid again for the same lands, and the Legislature, not having before it all the information about the sale of these Indian lands that subsequent researches of historians (and lawyers) have made available—this additional material being in the instant record to the extent that it is relevant—authorized a payment to the Indians of $5960. N. Y. Laws 1856, ch. 121 (R. 75).

After 102 years, there is a presumption of payment, and the Court of Appeals so held, 5 N. Y. 2d, at p. 39, citing *Bean* v. *Tonnele*, 94 N. Y. 381, 386 (1884), and other authorities.

No wonder that the Court below ruled against this attempt to be paid a third time, in an opinion the gist of which is as follows (5 N. Y. 2d, at p. 40):

"In any event, we have here the situation where the State of New York duly negotiated the Treaty of 1796 with various Indian tribes, including the St. Regis Tribe, in the presence of a Federal Commissioner. Thereafter a dispute arose over the meaning and application of the terms of that treaty. Certainly the State had the right to settle this dispute under that treaty through a legislative grant of compensation (see N. Y. Const., art. I, § 13). Thus this was not the negotiation of a new purchase of property from an Indian tribe, but rather the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty."

(2)

The attempt to spell out of this case questions worthy of this Court's attention because of the current controversy between New York and another Indian tribe, viz., the Tuscaroras (see Docket Nos. 384 and 386, October Term, 1958) is disingenuous and should not succeed.

The 1796 Treaty was signed in the presence of a federal commissioner (R. 66), and no question could possibly arise at this late date as to its conformity with the Act of March 1, 1793, § 8 (1 Stat. 330). The questions raised at p. 10 of the instant petition simply do not arise in the St. Regis case, but only (and less extensively than petitioner contends) in the Tuscarora case.

(3)

The elaborate discussion (Pet. Br., 16-17) of the Report of the Commissioners under the Treaty of Ghent (1814) has no bearing on the Treaty of 1796. The Report (R. 58-65) merely established the fact that the lands which the Indians conveyed always were in the State of New York; and whether we say that the disputed land has belonged to the State (and not the St. Regis Indians) since 1796, or

since 1856 completely freed of claims arising out of alleged ambiguities in the 1796 treaty, it is certain that the Report determined factual rather than legal issues, and did so in such a manner that the Legislature was able to come to terms with the Indians in 1856 and put an end to what had at most been a very doubtful claim. Such was the view of the Court of Appeals in the passage (5 N. Y. 2d, at p. 40) quoted *supra*, and it is amply supported by the record.

But whether the Indians surrendered their title in 1796 or in 1856 does not depend upon the proper resolution of a *federal* question.

(4)

The petitioner has never satisfactorily explained its century of delay in starting its program of assailing the 1856 settlement. This lapse of time strengthens the presumption of payment. *Bean* v. *Tonnele*, 94 N. Y. 381, 385-386 (1884); *Conkling* v. *Weatherwax*, 181 N. Y. 258, 267, 73 N. E. 1028 (1905).

Lapse of time also defeats the argument that the 1856 statute contravenes the Act of Congress known as the Indian Intercourse Act. It should be remembered that the Indians took the initiative and petitioned the Legislature for the relief embodied in the statute (R. 203, *et seq.*). When they decided to reverse their position, to attack the statute and to undo everything that had been done under it, common sense and fairness would seem to require that the asserted right of rescission be exercised promptly; and a delay of a century is hardly consistent with promptness. The principle, moreover, should be applied with special rigor when the attack tends to disturb the repose of titles.

The point is discussed in a well-reasoned opinion of the Supreme Court of Michigan, *Wall* v. *Zynda*, 283 Mich. 260,

278 N. W. 66, 114 A. L. R. 1521 (1938), where the Court said (p. 265):

> "In many cases the right to have rescission has been held to have been lost by laches within a much shorter period than the six-year statute of limitations. It is obvious that a prolonged period of time within which to bring an action for rescission would be quite incompatible with the character of the relief sought. A party asking restoration of the *status quo* for obvious reasons should be required to move promptly. Equity will not permit one possessed of a right of rescission to delay unduly in the exercise of that right and while so doing speculate on the outcome of the transaction at the risk of his adversary."

The law's reluctance to allow litigants to "put off action [*i. e.*, rescission] so as to speculate upon the outcome" was similarly stressed in *Shiverick* v. *Bonsall*, 185 App. Div. 338, 345, 173 N. Y. Supp. 90 (1918). And see 55 AM. JUR., tit. Vendor and Purchaser, § 623.

Obviously when regard is had to the fact that the petitioner now puts a value of $33,800,000 (R. 236-237) on lands it sold for $5960 in 1856 (R. 75, 79), the petitioner's addiction to speculation is established.

CONCLUSION

The petition for certiorari should be denied.

January 17, 1959.

Respectfully submitted,

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OCTOBER TERM, 1958

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THE ST. REGIS TRIBE OF MOHAWK INDIANS, *Petitioner*,

v.

THE STATE OF NEW YORK, *Respondent*.

PETITIONER'S REPLY BRIEF

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January, 1959.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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PETITIONER'S REPLY BRIEF

Because of the unusual circumstances* confronting counsel this Reply Brief is confined to a few hurried page by page observations on statements or implications in respondent's Brief in Opposition which should

* This brief is being written on January 29. Despite the requirement of Rule 24, petitioner's counsel of record has *never* been served with a copy of respondent's brief, and not until late in the afternoon of January 28 did he learn indirectly that respondent had nevertheless filed it on or about January 23. And not until he personally went to the Clerk's Office this morning (January 29) was he able for the first time to obtain and read a copy, and to learn that it had already in due course been distributed to the Court.

not be let stand without comment. All italicized page references are to the latter brief.

Page 1. It will be noted that respondent's apparently comprehensive summary of its opposition, viz., that the Court of Appeals' decision "rests on more than one non-federal ground to support it," is scarcely consistent with its statement at the bottom of *page 2* that "the gist" of that decision is the concluding paragraph of the opinion which most certainly presents a federal question as to the applicability of Sec. 177. Or with the stress placed on that same paragraph in the last two lines on *page 1* and the first two lines on *page 2*.

Page 1. The reference to the power of the State to take the Indians' lands not being at issue is a mere play on words which can be of no help to this Court as long as the manner of exercising that power remains so very much at issue.

Page 1. The reference to the Indians having "failed to prove" their title is ridiculous. As pointed out at page 3 of our Petition this case has been submitted to all four courts solely on the State's motion to dismiss. The Indians have never had their "day in court", when they are prepared to offer whatever proof may be necessary both as to their title, and as to disproving the irresponsible insinuations about "a third time" twice repeated on *page 2*.*

Pages 2 and 4. The attempt to stretch unduly the authority of *Bean* v. *Tonnele* on both pages and of *Conkling* v. *Weatherwax* on page 4 adds nothing to

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* Petitioner is the separate American portion of the St. Regis tribe, and is prepared to prove that the entire 1856 payment went to the Canadian Indians and their attorney.

the law of the case. For the Court of Appeals had already fully considered both cases and the limited presumption which they support as "obligat[ing] the claimants to come forward with more than the bare assertion that the money was not so paid" (Petition, page 15a) is an obligation which petitioner stands ready to meet—again as soon as it has its day in court. A respondent which itself made the election that is responsible for the case having first to wend its way through four courts on a motion cannot be heard to complain about what claimant has or has not proved.

Page 3. Frankly we resent the charge of disingenuousness. Indeed it is difficult to avoid the feeling that if the term is to be used at all it might far better be applied to respondent's obvious effort to distract attention from the consistent efforts of the State's highest court and its highest law officer to nullify an Act of Congress by their mere *ipse dixits*.

Page 3. Our "elaborate discussion" of the Report under the Treaty of Ghent (Pet. 16-17) was expressly directed to correcting the wholly erroneous implication of the concluding "gist" paragraph of the Court of Appeals' opinion that a dispute with respect to Barnhart's Island arose under the Treaty of 1796 and was settled by the 1856 transaction. Respondent's insistence on referring to the text at R. 58 is a boomerang. That text confirms our "discussion" and shows that as we said that dispute was much larger, involving approximately fifty other islands as well; that it arose under the treaty of 1783; and that it was settled under the procedure set up by the treaty of 1814.

Pages 4 and 5. All the talk about rescission is wholly irrelevant. Petitioner had nothing to rescind.

Supplemental. Pages 7-11 of the petition were devoted primarily to establishing the importance of and confusion attendant upon the federal question presented by this case. Since that petition was filed there has come to our attention still another contemporaneous New York State legislative report, that of the Special Legislative Committee on the Revision and Simplification of the Constitution, printed as Legislative Document No. 57 (May 1958). This report contains at pages 33-42 an analysis of the law relating to Indian lands, which is summarized on page 38 as follows:

> "The upshot of the matter is that for the first time in over 150 years a confident and comprehensive statement may now be made concerning state and federal power over Indians on reserved land in New York. Today New York has authority to apply its laws to occurrences on the Indian reservations. *But it cannot decide whether or not the tribal lands may be or must be conveyed to non-Indians. This remains within the sphere of federal power. . . .*" (Italicizing supplied.)

Respectfully,

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January, 1959.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 643

THE ST. REGIS TRIBE OF MOHAWK INDIANS, *Petitioner*,

v.

THE STATE OF NEW YORK, *Respondent*.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 613

THE ST. REGIS TRIBE OF MOHAWK INDIANS, *Petitioner*,

v.

THE STATE OF NEW YORK, *Respondent*.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME

Petitioner by its counsel moves for leave to file, within ten days after disposition of this motion, a petition for rehearing of the order of February 24, 1959, by which its petition for a writ of certiorari was denied. In support of this motion petitioner shows—

That its petition for a writ of certiorari was grounded primarily on a direct conflict between the decision below in the instant case and the even more recent decisions of *two* United States Courts of Appeals on the same federal question as to the application of 25 U.S.C. Sec. 177 to the State of New York, a matter of substantial importance to many owners

and lessees of real estate in that State and to all of its some 6,500 reservation Indians. Also that since May 11, 1959, a date some two and one half months subsequent to February 24, 1959, this Court now for the first time has before it undecided applications for review of both of those two decisions. October Term, 1958, Nos. 386 and 911. (The Federal Power Commission's avoidance of any reference to Sec. 177 in its current petition in No. 911 does not alter the fact that the whole ruling of which it complains was bottomed on and occasioned solely by the preliminary decision in part I of the opinion of the Court of Appeals of the District of Columbia sustaining the application of that section to the State of New York. See pages 26-27 and 33-35 of the Appendix to that petition.) And also that the same State of New York is a direct party in interest in all three cases, and either in its own name or in that of one of its agencies or officials has in all the courts below been a party of record in each of them.

Wherefore, petitioner submits that under all the circumstances the orderly processes of justice to all concerned indicate that all three cases should be before the Court when it is called upon to consider any one of them.

Respectfully,

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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME

This petition for rehearing is devoid of merit and devoid of candor.

There is no justification or the statement that there is

> "a direct conflict between the decision below in the instant case and the even more recent decisions of *two* United States Courts of Appeals on the same federal question as to the application of 25 U. S. C. Sec. 177 to the State of New York, a matter of substantial importance to many owners and lessees of real estate in that State and to all of its some 6,500 reservation Indians" (Motion papers, pp. 1-2).

The determinative issue in the case decided by the Court of Appeals of the State of New York was not the meaning

of a Federal statute but whether the claimant Tribe had not parted with title more than a century before the case reached that Court. We reaffirm the position we took in opposing certiorari last January, when we stated to this Court that the Tribe's claim was dismissed because the record showed they had voluntarily conveyed their lands to the State at least as far back as 1856 (see N. Y. Laws 1856, ch. 127, and R., 75). And, as we also showed, it is arguable that title was conveyed as far back as 1796, for the Court of Appeals of New York said that the 1856 transaction and the compensation then paid to the Tribe

> "was not the negotiation of a *new* purchase of property from an Indian tribe, but rather the adjustment of a claim that had arisen as a result of the ambiguous language of the 1796 treaty" (5 N. Y. 2d, 24, 40, 152 N. E. 2d 411, 419).

The Tribe was paid £1200 in 1796 (R., 67-68). It was paid $5960 in 1856 (R., 75). Its preposterous request that it be paid $33,800,000 for the same lands in 1959 (R., 236-237), stamps its claim as unique in the annals of jurisprudence, both from the point of view of audacity and of callous disregard for the facts of history.

The motion should be denied.

May 19, 1959.

Respectfully submitted,

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